
DATE: March 21, 1995
CASE NO. 89-ERA-23

IN THE MATTER OF

NOAH JERRY ARTRIP,

COMPLAINANT,

v.

EBASCO SERVICES, INC.,

RESPONDENT.

BEFORE: THE SECRETARY OF LABOR

DECISION AND ORDER OF REMAND

This proceeding arises under the whistleblower provision of the Energy Reorganization Act of 1974, as amended (ERA), 42 U.S.C. § 5851 (1988), and is before me for review of the Recommended Decision and Order (R.D. and O.) issued by the Administrative Law Judge (ALJ) on December 22, 1989. Complainant raised a number of allegations in his complaint, including retaliatory harassment, discharge, and failure to be rehired. The ALJ recommends dismissal of the entire complaint. I disagree and remand for the ALJ to determine the relief to which Complainant is entitled.

BACKGROUND

Respondent is an engineering and construction company that provides quality assurance services, both as a contractor and subcontractor, in the nuclear power industry. Hearing Transcript Volume II (T-II) at 121; Hearing Transcript Volume I (T-I) at

158. Complainant was employed by Respondent from 1982 until 1988, as an inspector, primarily in the area of paint coatings. Paint coatings are an engineered safety feature at nuclear facilities, which if installed incorrectly could jeopardize public safety. T-I at 66-68.

Complainant worked at the Comanche Peak Steam Electric Station in Glen Rose, Texas, for sixteen months and then was

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transferred to the South Texas station in Bay City, Texas, where he worked until he was laid off in December 1988. T-I at 68. While at Comanche Peak Complainant participated in a Nuclear Regulatory Commission (NRC) investigation of coating failures and quality issues. T-I at 69, 73. As a result of the investigation, the NRC required a "major rework" of the station. A Post Construction Hardware Validation Program (PCHVP) was developed and essentially has been regenerating a "whole new plant" since 1984. T-II at 105-106. After Complainant was transferred to South Texas, he testified in a whistleblower proceeding that had been commenced by his Comanche Peak supervisor, and he participated in the related NRC investigation. T-I at 72, 77.

In August of 1985, Complainant threatened to go to the NRC concerning alleged retaliation by his supervisor at South Texas. T-I at 83. In response, Respondent conducted an internal investigation and the supervisor, Tom Gliddon, ultimately was removed and transferred. Complainant's Exhibit (CX) 10. In 1987 the NRC conducted an extensive investigation of quality concerns and allegations brought forth by current and former employees at South Texas, including Complainant. T-I at 51, 91; CX 15. In November and December of 1988, Complainant provided information directly to the NRC regarding retaliation and quality issues at South Texas. T-I at 92, 103-104; CX 16.

On November 30, 1988, in anticipation of an impending lay-off at South Texas, Respondent compiled a master list of fifty-eight South Texas employees "for whom new assignments are being pursued." CX 25. The list, which included Complainant, was distributed to certain managers at various projects where Respondent was seeking either to hire directly, or to refer to the contractor or licensee for hire. Specifically, Respondent wanted to fill a request made by Texas Utilities, the licensee at Comanche Peak, for thermolag inspection personnel. In addition, Respondent had its own vacancies in vendor surveillance at the Savannah River station, and also had requests from the contractor at Savannah River for quality control inspectors. T-II at 21, 135-36, 152. In those situations where the contractor/licensee made requests for personnel, it also made the ultimate hiring decision, but Respondent placed the selected personnel on its payroll. Respondent's Brief at 3.

In response to Texas Utilities' request at Comanche Peak, Respondent's Quality Program Site Manager at that location, Jerry Hoops, decided to submit the resumes of fourteen people from the master list. Hoops recorded the names of those he selected in a memorandum dated December 16, 1988. CX 26. Complainant was not selected. Nor was Complainant selected for employment at Savannah River. Anthony Cutrona, the Quality Program Site

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Manager at Savannah River, and Thomas Brandt had input into the hiring decisions at that location. T-II at 53-54, 158.

DISCUSSION

Respondent stipulated that Complainant engaged in activity protected under the ERA and that it was aware of Complainant's protected activity. The stipulation is well supported by the record and the law. 42 U.S.C. § 5851(a)(1); *McCuistion v. TVA*, Case No. 89-ERA-6, Sec. Dec., Nov. 13, 1991, slip op. at 7 (safety complaint communicated to NRC protected); *Blake v. Hatfield Electric Co.*, Case No. 87-ERA-4, Sec. Dec., Jan. 22, 1992, slip op. at 4 n.3 (testimony in ERA hearing protected); *see Francis v. Bogan*, Case No. 86-ERA-8, Sec. Dec., Apr. 1, 1988, slip op. at 2 (threat to go to the NRC protected). [1]

The ALJ dismissed as time barred Complainant's allegations of violations that occurred more than thirty days before January 9, 1989, the date the claim was filed. He found the allegation of retaliatory layoff timely, but without merit. In making the finding that retaliation played no role in Complainant's layoff, the ALJ noted that Complainant admitted as much at the hearing. R.D. and O. at 6.

It is unnecessary to consider the propriety of Complainant's layoff in this case. Complainant, who has been represented by counsel throughout these proceedings, waived his claim of unlawful discharge at the hearing and reiterated his position in the brief that he filed before me. T-I at 150-51; Complainant's Brief at 8. Complainant also explained that he seeks a remedy only for acts of retaliation that occurred beyond his layoff on December 9, 1988. Complainant's Brief at 6, 8. I find no reason to disregard Complainant's decision to limit his claims and his theory of recovery.

With regard to Complainant's claims of post-layoff retaliation, the ALJ found that Complainant did not establish the causal element of a *prima facie* case because four other inspectors, who were not shown to be whistleblowers, also were not rehired or transferred after the layoff. The ALJ further found that Respondent articulated and proved legitimate nondiscriminatory reasons for Complainant's failure to be rehired or transferred. The ALJ credited Respondent's evidence that Complainant was not as qualified as those actually hired for positions at Respondent's other sites; found that at several sites, Respondent was not the ultimate decisionmaker in hiring personnel; and noted that Respondent demonstrated a corporate-wide reduction of its quality control staff during the pertinent time period. In conclusion, the ALJ stated that Complainant did not show that he is more qualified for any position than the

person actually hired, and the ALJ refused to "second guess employment decisions." R.D. and O. at 7.

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The ALJ viewed the issues too narrowly. He focused exclusively on Complainant's failure to be rehired, either by Respondent or by the contractor/licensee. Complainant's allegations, however, are broader. Complainant challenges: (1) Hoops' failure to include him on the list dated December 16, 1988, that was referred to Texas Utilities for work at Comanche Peak, (2) Cutrona's failure to refer him for work with the contractor at Savannah River, and (3) Brandt's failure to rehire him in vendor surveillance work at Savannah River. Thus, Complainant is challenging Respondent's refusal to rehire him and Respondent's refusal to refer him to a contractor/licensee for employment consideration. An employer's refusal to rehire a former employee constitutes an "adverse employment action." *Ruggles v. California Polytechnic State Univ.*, 797 F.2d 782, 786 (9th Cir. 1986). Also, the Secretary and various courts have recognized that an employer's interference with a former employee's prospective employment opportunities constitutes adverse action. [2] *E.g.*, *Egenrieder v. Metro. Edison Co.*, Case No. 85-ERA-23, Sec. Dec., Apr. 20, 1987, slip op. at 6-9 (blacklisting); *Charlton v. Paramus Bd. of Educ.*, 25 F.3d 194, 202 (3d Cir. 1994), *cert. denied*, 115 S. Ct. 590 (1994) (intervention in teaching license revocation proceeding); *Pantchenko v. C.B. Dolge Co.*, 581 F.2d 1052, 1055 (2d Cir. 1978) (refusal to provide reference); *Rutherford v. American Bank of Commerce*, 565 F.2d 1162, 1164 (10th Cir. 1977) (blacklisting); *Sparrow v. Piedmont Health Sys. Agency, Inc.*, 593 F. Supp. 1107, 1118 (M.D. N.C. 1984) (refusal to provide customary recommendation letter).

The ALJ's analysis does not resolve the questions presented. For example, the ALJ found that Respondent was not the "ultimate decisionmaker in the hiring of personnel" and was undergoing a corporate-wide staff reduction. R.D. and O. at 7. These are not significant conclusions in the context of whether Respondent retaliated against Complainant by refusing to refer him to a contractor/licensee. *Charlton*, 25 F.3d at 202 (defendant's lack of direct authority for ultimate adverse decision does not eliminate a potential Title VII violation). The ALJ's finding that Complainant was not as qualified as those actually hired for positions at Respondent's other sites is unexplained and undocumented. Upon thorough consideration of the record in conjunction with the ALJ's decision, I conclude that Complainant failed to prove either of his allegations concerning prospective employment at Savannah River, but met his burden and proved his allegation of Respondent's retaliatory refusal to refer him for employment at Comanche Peak.

The allegations concerning Savannah River

Complainant contends that he made a *prima facie* showing that

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Respondent refused both to refer him for employment at Savannah

River and to rehire him there in retaliation for his protected activities. Further, Complainant alleges that Respondent failed to meet its burden to produce any legitimate, nondiscriminatory reason for these actions. Although Charles Healy, Respondent's Director of Quality Assurance, testified that Complainant was not qualified for any of the positions that were filled at Savannah River after December 1, 1988, T-II at 152-53, Complainant implies that Healy's statement does not constitute the "reason" for Respondent's action. Complainant's position is that Healy merely deferred to the judgment of his subordinates, Cutrona and Brandt, neither of whom testified. Brief at 44. I reject the argument.

I find Healy's testimony sufficient to meet Respondent's burden of production. Healy's testimony adequately raises Complainant's qualifications as a fact at issue regarding the question of whether Respondent discriminated against Complainant. *St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742, 2747 (1993). [3] In claiming retaliatory refusal to hire or rehire after layoff, a complainant ordinarily must show as part of his *prima facie* case that he was minimally qualified for an available job. *Samodurov v. General Physics Corp.*, Case No. 89-ERA-20, Sec. Dec., Nov. 16, 1993, slip op. 9-10, citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); *see Blake,* slip op. at 5. The burden of proving his qualifications for an available job at Savannah River is on Complainant. [4]

The record does not establish that there were jobs available at Savannah River after Complainant's lay off, either with Respondent directly or with the contractor, for which Complainant was qualified. The only specific evidence of available jobs at Savannah River during the pertinent time period is Respondent's Exhibit (RX) 10. RX 10 is a list of the quality assurance personnel who were transferred, rehired, or newly hired by Respondent between December 1, 1988, and June 13, 1989. There is no evidence that there were any openings at Savannah River after December 9, 1988, which were not on the RX 10 list. Hoops' vague testimony that the Savannah River project was hiring is insufficient. T-II at 52. Furthermore, unlike the Comanche Peak allegation discussed below, there is no evidence that Cutrona actually refused to refer Complainant to the contractor.

Except for the vendor surveillance positions, Complainant does not point to or show any Savannah River job on the RX 10 list for which he was qualified. See T-II at 161. [5] Healy convincingly explained that the positions open in vendor surveillance dealt with equipment while Complainant's vendor surveillance experience dealt solely with coatings. T-II at 163. Healy's opinion is uncontroverted and is consistent with Complainant's resume. Accordingly, Complainant does not prevail

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on either claim of retaliation at the Savannah River station because he failed to prove he was qualified for any available job.

The allegation concerning Comanche Peak

A. *Violation*

Hoops conceded that Complainant was qualified for the thermolag position at Comanche Peak by virtue of his civil coatings and structural background. T-II at 46, 94, 99. In

deciding who to include on the December 16 referral list to Texas Utilities for the thermolag positions, Hoops testified that he reviewed resumes in depth, reviewed availability lists, and talked to people at various active projects. T-II at 15-16. Respondent has no particular referral policy and Hoops claimed that the decision was based solely on his assessment of relative qualifications. In particular, he stated that because Doug Snow of Texas Utilities had requested multi-certified personnel, if possible, he selected applicants with "as broad a background in as many disciplines as possible," including specific "coatings or fireproofing or thermolag experience." T-II at 20, 21-22, 28, 82-83.

Complainant has established that Hoops' explanation is a pretext and has established by a preponderance of the evidence that he was retaliated against in violation of the ERA. *See Carroll v. Bechtel Power Corp.*, Case No. 91-ERA-0046, Sec. Dec., Feb. 15, 1995, slip op. at 8-12 (restating and clarifying the burdens of proof in whistleblower cases). Hoops ultimately admitted that Complainant's resume indicates a multi-disciplined, broad base of experience. T-II at 50. Although Complainant did not have specific thermolag experience, neither did any of the other persons on Hoops' December 16 list, and only a couple of those on the list had actual fireproofing backgrounds. T-II at 63. At least one person included on the list had a certification background narrower than Complainant's, and that person was most recently employed in an area or discipline that Hoops testified was unimportant to the thermolag position. *Compare* RX 4E with T-II at 83. Of the entire South Texas Civil Coatings Staff, as it existed on December 9, only Complainant was either omitted from the December 16 list or not hired at Comanche Peak. RX 8. There is no evidence that any of the others had been employed at Comanche Peak previously.

Although Hoops testified that he reviewed resumes in depth, he then testified, "I don't know for a fact that I reviewed his [Complainant's] resume." T-II at 16, 43-44. However, Hoops had an intimate familiarity with Complainant's employment history even though he had never been stationed in the same facility with Complainant. I conclude that Hoops was familiar with Complainant because Complainant's reputation and history as a whistleblower

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was well known among Respondent's managers, including Hoops.

Hoops hired Complainant to work at Comanche Peak initially. At that time, and until early 1988, Hoops worked out of the home office in New York and had responsibility over all administrative type matters in the field. During those years the site manager at South Texas reported to Hoops. T-II at 113. Hoops was aware that Complainant had been transferred to South Texas. CX 3-7.

Cutrona was the site manager at South Texas until February 1988. *See* T-II at 180. Respondent's own personnel manager, Bill Urell, testified that Cutrona referred to Complainant as a "whistleblower." T-I at 51. Cutrona was fully aware of Complainant's participation in the Comanche Peak ERA hearing and Complainant's 1985 threat to contact the NRC, and he suspected more. CX 10, letter from Cutrona to Hurst, dated November 13, 1985; T-I at 51. [6]

Considering Hoops' responsibilities at South Texas during the time when Complainant's threat to contact the NRC led to a significant administrative action, *i.e.*, Gliddon's removal, and considering the working relationship between Cutrona and Hoops, I find that Hoops knew of Complainant's involvement and reputation as a whistleblower. Hoops admits that he was aware that Complainant had testified at the ERA hearing at Comanche Peak. *See* T-II at 106; *see also* CX 3-7.

In May 1988 Hoops became Respondent's site manager at Comanche Peak. T-II at 14. Hoops testified that Doug Snow, who made the request for personnel on behalf of Texas Utilities, was a supervisor in the Quality Control Department at Comanche Peak at the same time Complainant worked in that facility. T-II at 104. Hoops was aware of the magnitude of the Comanche Peak NRC investigation, the prior connection between Complainant and Snow, and Complainant's well-known reputation as a whistleblower. Therefore, I find that Hoops excluded Complainant from the December 16 list because he knew, or at least suspected, that Snow would not be interested in rehiring a former inspector from his department who had participated in an NRC investigation that forced the PCHVP, caused substantial delay in the project, and left the company with untold financial loss. [7] *Bartlik v. TVA*, Case No. 88-ERA-15, Sec. Dec., Apr. 7, 1993, slip op. at 2-3; *see Reich v. Hoy Shoe Co., Inc.*, 32 F.3d 361, 368 (8th Cir. 1994) (adverse action based on employer's suspicion of protected activities violates OSHA). Complainant proved that Respondent violated the ERA by refusing to refer him to Texas Utilities for the thermolag job. [8]

B. *Remedy*

The ERA provides that upon finding a violation the Secretary shall order the respondent to take affirmative action to abate the violation and reinstate the complainant to his former

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position together with the compensation (including back pay), terms, conditions, and privileges of his employment. Compensatory damages are also available, and a complainant may recover all costs and expenses reasonably incurred in bringing the complaint. 42 U.S.C. § 5851(b)(2)(B).

This case is unique because the violation was committed by a former employer who interfered with Complainant's prospects of future employment. Because of the indirect employment relationship, reinstatement is of course inappropriate. *Sibley Memorial Hosp. v. Wilson*, 488 F.2d 1338, 1342 (D.C. Cir. 1973). The more difficult question is whether Complainant is entitled to the remedy of back pay. After thoroughly reviewing the relevant case law, I conclude that he is.

Respondent's retaliatory refusal to refer Complainant's name on the December 16 list eliminated Complainant's chance of being hired in the thermolag job. Respondent controlled access to the employment and denied Complainant such access based on invidious criteria. Under these circumstances Respondent should bear the burden of disproving Complainant's entitlement to lost wages. *See Rutherford*, 565 F.2d at 1164; *Sibley Memorial Hosp.*, 488 F.2d at 1342.

I rely on the general principle that once discrimination has been proven, a presumption of entitlement to back pay arises. *Lewis v. Smith*, 731 F.2d 1535, 1538 (11th Cir. 1984). The burden then shifts to the employer to rebut the presumption by showing that the discriminatee would not have been hired absent the discrimination. *Id.; Ostroff v. Employment Exch., Inc.*, 683 F.2d 302, 304 (9th Cir. 1982) (placing burden on discriminating employment agency). The Department of Labor has applied this legal analysis in determining damages in other discrimination cases. *OFCCP v. PPG Indus., Inc.*, Case No. 86-OFC-9, Dep. Asst. Sec. Dec., Jan. 9, 1989, slip op. at 32-33. [9]

Although the ALJ made a summary finding that Complainant was not as qualified as those actually hired, the finding cannot be upheld. Respondent did not present evidence concerning the qualifications of all those selected and hired for the thermolag jobs, and it is too late to do so now. See T-II at 38.

I recognize that in this case Respondent did not have ultimate hiring authority over the thermolag positions. Respondent argues there is "no way to speculate whether Snow would have selected Artrip for hire." Respondent's Reply Brief at 5. However, Respondent could have called Snow to testify, or could have produced pertinent records regarding all the hires. Considering Respondent's close, intertwined employment relationship with the decisionmaking contractor, Texas Utilities, the witness and the records should have been easily accessible.

In determining the amount of back pay to which Complainant

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is entitled, the ALJ on remand shall be guided by the general principles previously enunciated by the courts and the Secretary. *See, e.g., Pillow v. Bechtel Const., Inc.*, Case No. 87-ERA-35, Sec. Dec., Jul. 19, 1993, slip op. at 25 (complainant has

burden to establish gross amount); *Lederhaus v. Paschen*, Case No. 91-ERA-13, Sec. Dec., Oct. 26, 1992, slip op. at 10 (burden then shifts to respondent to prove failure to mitigate); *Williams v. TIW Fabrication & Mach., Inc.*, Case No. 88-SWD-3, Sec. Dec., June 24, 1992, slip op. at 10-11 (addressing numerous issues including disability, interim earnings, unemployment compensation, and interest). On remand the ALJ must also consider the issues of compensatory damages, attorneys' fees, and expenses, and shall order posting or other appropriate relief. *Nathaniel v. Westinghouse Hanford Co.*, Case No. 91-SWD-2, Sec. Dec., Feb. 1, 1995, slip op. at 23.

Accordingly, this case IS REMANDED for the ALJ to fashion appropriate relief.

SO ORDERED.

ROBERT B. REICH
Secretary of Labor

Washington, D.C.

[ENDNOTES]

[1] Because this case arises within the appellate jurisdiction of the United States Court of Appeals for the Fifth Circuit, I do not rely on Complainant's purely internal safety complaints as protected conduct. *See Brown & Root, Inc. v. Donovan*, 747 F.2d 1029 (5th Cir. 1984) (ERA does not protect intracorporate reports).

[2] I note that Complainant clearly was an "applicant" for reemployment. Complainant was included on the November 30 list of potential hires that was circulated among Respondent's managers with hiring authority. Furthermore, it is uncontradicted that at the time of his layoff Complainant was told by his supervisor that all of the inspectors in his department would be referred for the thermolag jobs at Comanche Peak. T-I at 107. An employer may provide its employees with many benefits that it is under no obligation to furnish, but those benefits may not be doled out in discriminatory fashion. *Hishon v. King & Spalding*, 467 U.S. 69, 75 (1984).

[3] In its briefs, Respondent offers additional reasons for the adverse employment decisions. These reasons, not previously clearly articulated, are insufficient to meet Respondent's burden, and I do not consider them. *Texas Dept. of Comm. Affairs v. Burdine*, 450 U.S. 248, 255 n.9 (1981).

[4] Contrary to the ALJ's ruling, a complainant need not show that he was "treated differently from other similarly situated employees" to establish a *prima facie* case. *DeFord v. Secretary of Labor*, 700 F.2d 281, 286 (6th Cir. 1983);

Helmstetter v. Pacific Gas & Electric Co., Case No. 91-TSC-1, Sec. Dec., Jan. 13, 1993, slip op. at 9.

[5] I do not accept Complainant's attempt to bring clerical jobs into this dispute. The loss of a clerical job clearly was not the subject of his complaint.

[6] There is evidence that Complainant's immediate supervisor at South Texas, Gliddon, also perceived Complainant as a "troublemaker" because he had been involved in whistleblower allegations at Comanche Peak. CX 10 Statement of Russell Boutin; *see* T-I at 133.

[7] I reject Hoops' claim that at the time he prepared the December 16 list for referral to Texas Utilities he could not "recollect" if Complainant had been involved in the Comanche Peak coatings investigation. T-II at 106. Hoops knew that Complainant had been a coatings inspector there when the major NRC investigation into coatings failures took place and the resultant stop-work order ensued. *See* T-II at 112, 65; T-I at 56. Although Hoops was unaware of Complainant's protected activity in November and December, 1988, Hoops' refusal to refer Complainant was based on earlier protected activity.

[8] Even assuming this to be a case of "dual motives," Respondent failed to prove, or argue, that it would have made the same decision -- to exclude Complainant's name from the December 16 list -- even if Complainant's protected activity did not play a role in that decision. *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775, 1787-88 (1989).

[9] I am aware that in *Charlton* the court stated that the employee must demonstrate that but for the former employer's intervention, the "revocation proceeding [which would result in lost employment] would not have gone forward." 25 F.3d at 202. This case is different. The revocation proceeding in *Charlton* could have gone forward based on the employee's conduct, irrespective of the employer's intervention. Here, the employer's omission is an independent cause of Complainant's failure to be considered for the thermolag job.